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No. 96-1425

In the Supreme Court of the United States

OCTOBER TERM, 1996

RANDALL A. TERRY, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248.

2. Whether the Access Act is an unconstitutional viewpoint-based restriction on speech.

3. Whether the Access Act is unconstitutionally overbroad or vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 101 F.3d 1412. The opinion of the district court (Pet. App. 24a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on March 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-

259, § 3, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. *Ibid.*; H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7, 9; H.R. Conf. Rep. No. 488, 103 Cong., 2d Sess. 7 (1994) (Conf. Rep.). That violence endangered the lives of, and inflicted injuries on, physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9-10. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek

abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. S. Rep. at 19-21; H.R. Rep. 6, 10.

The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person

> is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

18 U.S.C. 248(a). The Act specified, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual and Procedural Background*

a. On May 26, 1994, the date that the President signed the Access Act into law, petitioners brought the instant suit challenging the constitutionality of the Access Act, both on its face and "as applied or threatened to be applied to them." Pet. App. 3a. Petitioners are abortion opponents who have participated in protests outside reproductive health facilities. *Id.* at 3a-4a. They alleged that the Access Act violates the First, Fifth, Eighth, Tenth, and Fourteenth Amendments, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.2000bb *et seq.* Pet. App. 25a-26a.

The district court granted the government's motion, under Fed. R. Civ. P. 12(c), for judgment on the pleadings. Pet. App. 24a-35a. The court agreed

with the various courts of appeals and district courts that already had upheld the constitutionality of the Access Act against similar challenges. *Id.* at 27a-28a & n.2. The court emphasized that the Access Act regulates conduct, not speech, unless the speech constitutes a threat of force. *Id.* at 29a. The court adopted the reasoning of the Fourth Circuit in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 116 S. Ct. 55 (1995), and ruled that the Access Act is viewpoint and content neutral, that it is not unconstitutionally overbroad or vague, that its incidental effect on speech passes the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and that it does not constitute a prior restraint. Pet. App. 29a-30a. The court also held that the Access Act is not an irrational restraint on speech, that sufficient alternative channels of communication remain available, that the Act does not interfere with freedom of the press, and that it does not interfere with petitioners' right of freedom of assembly. *Id.* at 30a-31a. The district court rejected petitioners' due process and equal protection claims as well, and ruled that their Eighth Amendment claim was not ripe for review. *Id.* at 31a-32a. The court concluded that the Access Act does not violate RFRA because, assuming *arguendo* that the Act substantially burdens petitioners' exercise of religion, the Act is sufficiently narrowed to further compelling government interests. *Id.* at 34a-35a.

The district court rejected petitioners' Commerce Clause challenge, agreeing with the Eleventh Circuit's conclusion in *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 (1995), that the Access Act "protects and regulates commercial enterprises operating in interstate commerce" and is, therefore, a permissible exercise of congressional power. Pet. App. 33a.

b. The court of appeals affirmed. Pet. App. 1a-23a. The court stated its agreement with the four other circuits that had considered, and sustained, the constitutionality of the Access Act. *Id.* at 2a. The court held that Congress did not exceed its commerce power in enacting the Access Act because the legislative record underlying the Act "contains sufficient findings to conclude that violent and obstructive protest activities substantially affect interstate commerce in reproductive health services." *Ibid.*; see *id.* at 6a-11a (detailing findings). The court also held that the Access Act's lack of a jurisdictional element did not render it invalid under the Commerce Clause in light of Congress's legislative findings of the effect on interstate commerce of the regulated activities. *Id.* at 12a-13a (relying on *United States* v. *Lopez*, 115 S. Ct. 1624 (1995)).

The court of appeals rejected petitioners' First Amendment challenges, finding that the Act prohibits certain conduct, not speech, and is, in that respect, "virtually identical to the statute upheld in *United States* v. *O'Brien*, 391 U.S. 367 (1968), which also punished conduct—the destruction of draft cards." Pet. App. 13a. The court concluded that, to the extent any of the prohibited conduct might have expressive value, the Act satisfies the *O'Brien* test because it is narrowly tailored to further important government interests that are unrelated to the suppression of free expression. Pet. App. 13a-16a. The court ruled that the motive requirement of the Act—that a person violates the Act by engaging in the prohibited conduct "because" another person is obtaining or providing reproductive health services—does not render it unconstitutional because that requirement merely narrows the Act's reach. *Id.* at 18a. The court found

the instant case indistinguishable from *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), in which this Court upheld, against First Amendment challenge, a statute that enhanced a criminal sentence if the defendant engaged in the prohibited conduct because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. Pet. App. 16a-17a. The court concluded that the Act is not unconstitutionally overbroad or vague and rejected petitioners' equal protection claim. *Id.* at 18a-21a.[1]

The court rejected petitioners' contention that the district court had disregarded evidence that the government had attempted to apply the Access Act to enjoin persons engaged in protected First Amendment activity near abortion clinics. Pet. App. 21a-22a. The court found that, in none of the cases cited by petitioners, had the government attempted to use the Act to punish First Amendment activity, and that petitioners' argument came "perilously close to misstating the record." *Id.* at 21a. Finally, the court rejected petitioners' claim that the government was not applying the Act evenhandedly. The court noted that petitioners had not alleged selective prosecution in their complaint and that, in ruling on the government's Rule 12(c) motion, the district court had properly refused to consider evidence beyond the scope of the complaint. Pet. App. 22a-23a.

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[1] The courts below also declined to address various claims that petitioners had not properly raised or preserved (Pet. App. 4a-5a), and petitioners do not present any of those issues for this Court's review.

ARGUMENT

Petitioners contend that Congress lacked authority under the Commerce Clause to enact the Access Act (Pet. 8-15), and that the statute violates the First Amendment (Pet. 15-25). Petitioners' arguments are substantially similar to arguments raised in several petitions for writs of certiorari that the Court recently declined to review: *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 647 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir.), cert. denied, 115 S. Ct. 2577 (1995); *United States* v. *Soderna*, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir.), cert. denied, 117 S. Ct. 613 (1996); and *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996). The Court should deny review in the instant case for the same reasons. The court of appeals' decision is correct and does not merit further review.[2]

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[2] Petitioners acknowledge (Pet. 5-6 n.3) that all the federal courts of appeals that have considered constitutional challenges to the Access Act have upheld the validity of the Act. They also acknowledge (*ibid.*) that at least half a dozen district courts have held that the Act survives constitutional scrutiny. They nonetheless contend that the opinions of two district courts (one that was overruled and another that is pending on appeal), and a single dissenting judge in the courts of appeals, persuasively demonstrate that the Access Act is unconstitutional. *Ibid.* (citing cases). The district court decision on which petitioners rely, and which is pending appeal, conflicts with the binding precedent of its own circuit, see *American Life League, supra*, and obviously does not create an inter-circuit conflict calling for this Court's review. See *Hoffman* v. *Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582 and 96-1583 (4th Cir.) (argued Apr. 9, 1997).

1. Petitioners claim (Pet. 8-15) that the decision below conflicts with the Court's decision in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because, in their view, the Access Act does not address activities that substantially affect interstate commerce.

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

The court of appeals correctly held that the Access Act is a valid exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630.[3] Congress is empowered to regulate conduct that substantially affects interstate commerce when considered in the aggregate. *Wickard* v. *Fillburn*, 317 U.S. 111, 124-125, 127-129 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted)

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[3] We also maintain that the Access Act is a proper exercise of Congress's power, under the Commerce Clause, to regulate or to protect "persons or things in interstate commerce," *Lopez*, 115 S. Ct. at 1629, and under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach these questions, however, they are not before the Court.

(upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one ophthalmologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. Such conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. H.R. Conf. Rep. 7; S.

Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial discrimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the court of appeals' holding. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act of 1990, Pub. L. No. 101-647, Tit. XVII, § 1702, 104 Stat. 4844, that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the mere possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regu-

lated conduct substantially affects interstate commerce. *Id.* at 1631-1632.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 115 S. Ct. at 1630-1631. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (increased potential for violence in schools) was commercial, here the immediate effect of the prohibited conduct is obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruction of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3, 31. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

The *Lopez* Court reaffirmed that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." 115 S. Ct. at 1631 (emphasis added). Indeed, nothing in that decision

questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular commercial service (*i.e.*, reproductive health care).

2. Petitioners contend (Pet. 15-21) that the Access Act is facially invalid under the First and Fifth Amendments because it singles out abortion opponents for selectively harsh treatment and constitutes a viewpoint-based ban on speech.[4]

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. 18 U.S.C. 248(a)(1). As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S.

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[4] To the extent petitioners may be making a selective enforcement argument (see Pet. 5-7, 15-16), the courts below rejected that claim as beyond the allegations of the complaint (see Pet. App. 22a-23a) and, therefore, it is not properly before this Court.

611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from their communicative impact." *Mitchell*, 508 U.S. at 484-485 (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984)).

Contrary to petitioners' assertion, the Access Act is viewpoint neutral because it "serves purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the viewpoint of any expression it may incidentally affect, but by the needs to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Pub. L. No. 103-259, § 2, 108 Stat. 694 (Purposes). Those interests are unrelated to any expressive content the forbidden conduct may have. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioners argue (Pet. 18-21), however, that the Access Act is viewpoint based because it proscribes certain activities only when the person acts because another person is seeking to obtain or provide reproductive health services, or because a facility provides such services. See 18 U.S.C. 248(a)(1) and (a)(3). This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Mitchell*, 508 U.S. at 485-486.

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counselling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services. The Act targets intentional interference with any reproductive health service, regardless of the perpetrator's views about abortion. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force or obstruction to achieve that end would violate the Act.

b. If we assume, *arguendo*, that the conduct prohibited by the Access Act has sufficient expressive content to implicate the First Amendment, the Act would easily survive scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests, including protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have

explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility towards the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes obstructive, threatening, and violent conduct, without regard to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered

facilities and regardless of the content of the speech. *American Life League*, 47 F.3d at 648.

This Court's recent decisions in *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York*, 117 S. Ct. 855 (1997), support the Access Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion protestors who had engaged in specific protests outside a particular health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act—interfering with access to, ingress into, and egress from the clinic; and physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, or harassing, intimidating or threatening any employee of the clinic. The injunction also enjoined the protestors from, *inter alia*, congregating or demonstrating in a fixed zone around the clinic entrances, and making loud noises outside the clinic. See 512 U.S. at 759-761. The Court upheld those aspects of the injunction, concluding that those restrictions were content neutral, that they were unrelated to the defendants' message, and that they burdened no more speech than necessary. *Id.* at 762-764, 768-770, 772. Similarly, in *Schenck*, the Court upheld certain provisions in a preliminary injunction that banned demonstrating within fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances. 117 S. Ct. at 868-869. The Court reaffirmed *Madsen*, and ruled that the fixed buffer zone limitations were valid because they were justified by significant government interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom

to seek pregnancy-related services, and were appropriately tailored to serve those interests. *Id.* at 866, 868-869.

3. Petitioners assert (Pet. 21-25) that the Access Act is unconstitutionally vague and overbroad.

The statutory terms challenged by petitioners give people of ordinary intelligence "a reasonable opportunity to know what is prohibited." *Schenck*, 117 S. Ct. at 869-870 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). For example, the term "physical obstruction," is defined by the Act to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

18 U.S.C. 248(e)(4). That provision is almost identical to one the Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.

The Act similarly defines other statutory terms in words of common understanding: "interfere with" means "to restrict a person's freedom of movement" (18 U.S.C. 248(e)(2)), "intimidate" means "to place a

person in reasonable apprehension of bodily harm to him or herself or to another" (18 U.S.C. 248(e)(3)). The court of appeals correctly concluded that, in light of the statute's explicit definition of various terms and its plainly legitimate sweep, it is not overly broad or vague: "While 'the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,"' the Access Act defines its terms narrowly and in clearly understandable language." Pet. App. 20a (quoting in part, *Grayned*, 408 U.S. at 110 n.15, and *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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